

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

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**HABITAT EDUCATION CENTER, INC., et al,**  
**Plaintiffs,**

**v.**

**Case No. 07-C-0578**

**UNITED STATES FOREST SERVICE, et al.,**  
**Defendants.**

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**ORDER**

Plaintiffs filed the present action pursuant to the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, arguing that in approving a forest project (the “Twentymile” project) in the Chequamegon-Nicolet National Forest (“CNNF”), the Forest Service violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 –1687. Currently pending are the parties’ cross-motions for summary judgment. The motions have been fully briefed, and I held oral argument on the motions on December 3, 2008.

Shortly before oral argument, plaintiffs raised a new issue: whether the Environmental Impact Statement (“EIS”) for the Twentymile project was inadequate because it failed to consider the environmental effects of a separate project, the “Twin Ghost” project, as part of its cumulative effects analysis. The Twin Ghost project was proposed on November 19, 2008, but the EIS for the Twentymile project was issued almost two years ago, in January 2007. The Forest Service argues that it was not required to consider the possible effects of the Twin Ghost project because at the time that the Twentymile EIS was completed, the Twin Ghost project was not yet formally proposed.

However, the Twentymile administrative record contains an internal Forest Service e-mail dated June 30, 2005, in which the Forest Service's environmental coordinator advises the Twentymile project coordinator that the Twin Ghost project was likely to be "scoped" soon. (R. 1711-12.) The question for the court is whether this evidence shows that at the time that the Twentymile EIS was completed the Twin Ghost project was a "reasonably foreseeable future action" within the meaning of 40 C.F.R. § 1508.7, such that the Forest Service was required to discuss it in its cumulative effects analysis. (The Forest Service concedes that it did not consider Twin Ghost in its cumulative effects analysis.)

The parties discussed this question at oral argument, but the court finds that it would benefit from supplemental briefing. The court asks that the Forest Service submit a brief of no longer than 10 pages limited to the issue of whether the failure to consider the Twin Ghost project as part of the Twentymile project's cumulative effects analysis violates NEPA. Plaintiffs will be allowed to file a response brief of no longer than 10 pages limited to the same issue. As part of their briefs, the parties are encouraged (though not required) to discuss the following aspects of the problem: (1) What is the legal definition of a "reasonably foreseeable future action"? (2) Prior to January 2007, was it possible to quantify the potential environmental effects of the Twin Ghost project? (3) Is the Twin Ghost project within the cumulative effects geographic area for the Twentymile project? (4) Did plaintiffs raise the Forest Service's failure to consider Twin Ghost during the administrative stages of this case, and if not, have the plaintiffs waived or forfeited this issue, or are they otherwise precluded from raising it? (4) Was the failure to consider Twin Ghost harmless; that is, would considering the effects of the project (to the extent that those effects could have been predicted by the Forest Service in January 2007) have

meaningfully changed the Twentymile cumulative effects analysis?

The court notes that it agrees with the Forest Service that whether the Twin Ghost project was reasonably foreseeable must be evaluated based on the facts known to the Forest Service while it was preparing the Twentymile EIS, and not based on the facts as they exist today. Thus, the parties are advised against relying on information that the Forest Service did not possess prior to January 2007.

**THEREFORE, IT IS ORDERED** that on or before **December 15, 2008**, defendants file a brief of no longer than 10 pages addressing only the issue of whether the Forest Service's failure to consider the Twin Ghost project as part of the Twentymile project's cumulative effects analysis violates NEPA.

**IT IS FURTHER ORDERED** that plaintiffs may file a response brief of no longer than 10 pages limited only to the same issue on or before **December 22, 2008**.

Dated at Milwaukee, Wisconsin, this 7 day of December, 2008.

/s\_\_\_\_\_  
LYNN ADELMAN  
District Court Judge